

17

Office - Supreme Court, U. S.

FILED

MAR 27 1942

CHARLES ELMORE CRADLEY  
CLERK

**Supreme Court of the United States**

---

OCTOBER TERM, 1941.

---

No. **1082**

---

ALVAH H. WEATHERS, PETITIONER,  
VS.  
UNITED STATES OF AMERICA.

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

---

PHILIP DONALD DEHOFF,  
Jacksonville, Florida,  
*Attorney for Petitioner.*



## INDEX

Opinion Below .....	1
Jurisdiction .....	2
Questions Presented .....	2
Summary and Statement of Matter Involved .....	4
Specification of Errors to Be Urged .....	7
Reasons for Granting the Writ .....	9
Argument in Support of Petition .....	10
Conclusion .....	19

## CITATIONS

United States Constitution, Sixth Amendment .....	9, 18
---	-------

## CASES

Berger vs. U. S., 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 .....	15
Biandi vs. U. S., (C. C. A. 6) 259 Fed. 93 .....	11
Bolt vs. U. S., (C. C. A. D. C.) 2 F. 2d 922 .....	11
Bours vs. U. S., (C. C. A. 7) 229 Fed. 960 .....	10
Boyett vs. U. S., (C. C. A. 5) 48 F. 2d 482 .....	16
Butler vs. State, 94 Fla. 163, 113 So. 699 .....	14
Coffey vs. U. S., 116 U. S. 436, 6 S. Ct. 436, 29 L. Ed. 684 .....	10
Clinton vs. State, 53 Fla. 98, 43 So. 312 .....	15
Croft vs. State, 117 Fla. 832, 158 So. 454 .....	16
Cross vs. State, 96 Fla. 768, 119 So. 380 .....	13
Deas vs. State, 119 Fla. 839, 161 So. 729 .....	15
Gambino vs. U. S., (C. C. A. 3) 108 F. 2d 140 .....	11
Henderson vs. State, 94 Fla. 318, 113 So. 689 .....	18
Hunter vs. U. S., (C. C. A. 5) 62 F. 2d 217 .....	12
In re Food Conservation Act, 254 Fed. 893 .....	11
Johnson vs. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 .....	18
Jordan vs. State, 107 Fla. 333, 144 So. 669 .....	14

Kesley vs. U. S., (C. C. A. 5) 47 F. 2d 453.....	17
Krause vs. U. S., (C. C. A. 4) 29 F. 2d 248.....	12
Latham vs. U. S., (C. C. A. 5) 226 Fed. 420.....	15
Mattson vs. U. S., (C. C. A. 8) 7 F. 2d 427.....	11
McNutt vs. U. S., (C. C. A. 8) 267 Fed. 670.....	6
Messer et al. vs. State, 120 Fla. 95, 162 So. 146.....	14
Peterson vs. U. S., (C. C. A. 9) 213 Fed. 920.....	17
Safter vs. U. S., (C. C. A. 8) 87 Fed. 329.....	13
Sorrells vs. U. S., 287 U. S. 434, 53 S. Ct. 210, 77 L. Ed. 413.....	12
State ex rel. Weathers vs. Davis, 196 So. 487, 143 Fla. 250.....	5, 14
Stewart vs. U. S., (C. C. A. 8) 300 Fed. 769.....	17
Toothman vs. U. S., (C. C. A. 4) 203 Fed. 218.....	13
Turner vs. U. S., (C. C. A. 8) 35 F. 2d 25.....	15
U. S. vs. Adams, 59 Fed. 674.....	12
U. S. vs. Becker, (C. C. A. 2) 62 F. 2d 1007.....	12
U. S. vs. Carlisi, 32 Fed. Supp. 479.....	11
U. S. vs. Moser, 266 U. S. 236, 45 S. Ct. 66, 69 L. Ed. 262.....	10
U. S. vs. Schultz, 3 Fed. Supp. 273.....	12
U. S. vs. Tom Yu, 1 Fed. Supp. 357.....	12
Weathers vs. U. S., 117 F. 2d 585.....	4, 10
Yep vs. U. S., (C. C. A. 10) 83 F. 2d 41.....	11

## STATUTES

Tit. 18, Sec. 334, U. S. C. A. ....	4
Judicial Code, Section 240-(a) .....	2

# Supreme Court of the United States

---

OCTOBER TERM, 1941.

---

No. \_\_\_\_\_.

---

ALVAH H. WEATHERS, PETITIONER,  
VS.  
UNITED STATES OF AMERICA.

---

## **PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

To the Supreme Court of the United States:

Now comes Alvah H. Weathers and respectfully shows to this Honorable Court as follows:

1.

Petitioner prays that writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled case, No. 9912, entered on February 28, 1942 (not yet reported), affirming the orders and judgment of the District Court for the Southern District of Florida, Jacksonville Division.

(R 237-242)

## JURISDICTION.

The Jurisdiction of this Court is invoked under Section 240-(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal cases promulgated by this Court.

### QUESTIONS PRESENTED.

1. Where the indictment letters alleged to have been written by petitioner did not state positively how, where or by whom an abortion would be produced, was not the court in error in not quashing the indictment?

2. Where, on the first trial of the petitioner on an indictment containing two counts, a Motion for Directed Verdict was granted as to the second count thereof and the jury subsequently found the petitioner not guilty on the second count and after judgment the said case is appealed and a new trial granted, and thereafter on subsequent trial on the first count was not the lower court in error (a) in admitting into evidence certain letters upon which original second count of indictment was based, including the letter actually charged therein, and which were specifically charged in said second count and in said first trial had been introduced into evidence, and (b) especially when sufficient proof was not offered even in the second trial of the cause to show that defendant had written said letters?

3. When, during the course of a trial for violating the postal laws where all letters allegedly written by defendant were secured in answer to decoy letters, the Government's witness stated that "he had received a complaint that the defendant was committing abortions," (a) was not the Court in error in admitting said statement, and (b) if court was not in error in admitting such statement, did not the Court err in denying the petitioner the

right to inquire into the nature of the complaint in an attempt to establish the defense of entrapment without reasonable grounds on the part of the decoying officials to believe that the accused had previously committed a crime of the same character as the one in which he was sought to be decoyed?

4. Where the petitioner is charged with sending information through the mails as to where, how, and by whom an abortion could be produced, was not the court in error in allowing one of the witnesses to testify as to alleged statement petitioner was supposed to have made that he performed abortions?

5. Did not the trial court err in not rebuking and repressing the conduct of the Assistant District Attorney, (a) during the course of the trial by allowing him to make innuendoes and suggestions of criminality on the part of the accused and unauthorized attacks on the character and professional standing of accused under guise of cross-examination; (b) for his remarks and statements in his argument to the jury on matters dehors the record and intended to incite the passions and influence the minds of the jury?

6. Did not the Court (a) err in giving additional charge to the Jury without first advising counsel for both parties of his intentions to do so, and accord to them a reasonable opportunity to request special charges; (b) coerce the minds of the jurors both by depriving them of their right to pass on all questions of fact, and (c) charging them so that failure to agree would be a reflection upon the intelligence and integrity of some of them; (d) in effect gag defense counsel and attempt to shut off proper objections to argument?

## SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioner was charged with violating Tit. 18, Sec. 334, U. S. C. A., by sending through the mails information as to how, where and from whom abortions could be produced. The original indictment consisted of two counts, charging two separate offenses. On the first trial, the court entered its Directed Verdict of "Not Guilty" on the second count for the defendant (Record, First Appeal, Circuit Case No. 9541, page 134) and thereafter the jury returned a verdict finding the defendant "Guilty" on the first count and "Not Guilty" on the second count (Record, First Appeal, Circuit Case No. 9541, page 171).

An appeal was taken from that verdict which resulted in a new trial being granted on the ground of improper argument by the United States Attorney (*Weathers v. U. S.*, 117 F. 2d 585). Prior to presenting evidence on the new trial the petitioner renewed his plea for a Motion to Quash the first count, which was denied (R. 24, 25). Ground on said Motion to Quash being the same as on original case (Record, First Appeal, Circuit Case No. 9541, pages 8-12). Said motion had been previously passed upon by the Circuit Court of Appeals adversely to the petitioner although the Circuit Court stated in effect that said indictment was poorly drawn (*Weathers v. U. S.*, 117 F. 2d 585). Thereafter on this new trial, testimony showed that one E. O. Jones, a Post Office Inspector, stated he had received a complaint that the defendant was sending through the mails information regarding abortions (R. 81 and 86). On the first trial Jones stated on cross-examination that prior to writing the decoy letters he had never had any prior information that petitioner had ever used the mails to solicit any abortions, but on cross-examination in the instant case he stated he had. He was then impeached by reading to him his prior testimony (R. 81-87). That he thereafter, in conjunction with Post Office Inspectors in Savannah, prepared decoy letters which he



forwarded to Savannah for mailing to the defendant's address in Jacksonville (R. 47).

The defendant had, for many years previous, inserted in newspapers in various southern cities advertisements regarding a "maternity home" (R. 177).

After introduction by the government of the decoy letter and defendant's reply thereto—which defendant subsequently admitted sending—(R. 175) the government then proceeded to introduce all the other letters that had been used on the first trial, one of which letters constituted the basis of the second count of the original indictment (See certified copies of Transcript on the First Appeal, Case No. 9541, Circuit Court of Appeals, pages 5, 70, 79-82, filed herein for said purpose).

These were allowed to be filed for identification and later introduced in evidence, despite defendant's objections that they were "*res judicata*" and the Court had granted a Directed Verdict with respect thereto on the first trial of said cause, stating in effect that there had been insufficient evidence to connect defendant with the said letters (R. 52-60).

During the course of the trial the Government introduced a certain witness who testified that petitioner had told her that he got a certain sum for each abortion (R. 102).

When petitioner testified, the Court over objection permitted the Assistant District Attorney not only to question him on his previous conviction of a crime which he had admitted on direct examination (R. 175, ~~176~~) but to go into the number of times (R. 185-187). The Court further allowed the Government to inquire of defendant whether he had been disbarred from the practice of medicine (R. 188-191) although the defendant had not offered any character evidence and although it was known to the District Attorney that defendant's right to reinstatement had been upheld by the Supreme Court of Florida. *State ex rel. Weathers v. Davis et als.*, 143 Fla. 250, 196 So. 487, decided May 28, 1940.

That during the course of the District Attorney's argument to the Jury he made numerous prejudicial statements and further argued facts that were nowhere introduced into evidence, and upon attempt of petitioner's counsel to object to said argument, the Court in effect gagged and closed the mouths of counsel (R. 206 and 208).

One of the main defenses of the petitioner was entrapment, but the Court refused to permit the petitioner to inquire into the nature of the information allegedly given to the Post Office Inspector upon the basis of which the decoy letters were written (R. 87). After the Jury had returned a number of times for further instructions on the law of entrapment, the Court went on to charge the Jury, in part:

"The main question in this case, gentlemen, is the question of intent. \* \* \* The whole thing is intent on the part of the defendant. \* \* \* Now, that is all there is to this case. \* \* \*" (R. 226, 227).

The Court further attempted to give an additional charge thereafter on the lines of the "Allen Case" (R. 223), but which transcended the statements of said case.

To some of the Court's rulings it will be noticed that no exception was asked but the court had previously stated that:

"Note exceptions to every adverse ruling, but I don't think it is necessary" (R. 107).

Moreover, it has been held that

"The courts of the United States, in the exercise of a sound discretion, may notice and relieve from radical errors in the trial which appear to have been seriously prejudicial to the rights of the defendant, although the questions they present were not properly raised or preserved by objection, exception, request, or assignment of error."

*McNutt v. U. S.*, (C. C. A. 8) 267 Fed. 670.

#### SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in approving the action of the trial court:

1. In not quashing the indictment.
2. In admitting in evidence over defendant's objection (a) the letter charged in the second count of the indictment which the defendant had been found not guilty of writing by directed verdict of the Court on the first trial of the case; and (b) certain other letters introduced in the first trial to support the said second count of the indictment.
3. In permitting the prosecuting witness who instigated the sending of the decoy letters to testify that he had received a complaint that the defendant was committing abortions.
4. In denying defendant the right to enquire, for the purpose of showing entrapment, into the nature and extent of the information upon which the Post Office Inspector based his sending of decoy letters.
5. (a) In not granting a directed verdict upon the basis of entrapment when there was no showing that the decoying officials had legally sufficient knowledge and information to believe that the accused had previously committed a crime of the same character as the one in which he was sought to be decoyed,  
(b) In not granting a directed verdict upon the basis of entrapment when it was shown that the only information upon which the decoying officials of the United States predicated their sending of decoy letters was that the accused was violating a State and not a Federal statute.

6. In allowing a government witness to testify concerning a statement alleged to have been made to her by accused to the effect that he performed abortions, when the accused was on trial not for committing abortions, a State offense, but for the Federal offense of sending prohibited matter through the mails.

7. In permitting the Assistant District Attorney:

(a) To make innuendoes and suggestions of criminality on the part of the accused under the guise of cross-examination;

(b) To make unauthorized attacks on the character and professional standing of the accused under the guise of cross-examination;

(c) To argue to the Jury on matters dehors the record in a manner intended to incite the passions and influence the minds of the Jury.

8. In giving additional charges to the Jury without first advising counsel of his intention so to do, and accord counsel a reasonable opportunity to request special charges.

9. In effect coercing the minds of the Jury by depriving them of their right to pass on all questions of fact by telling them after they had returned a number of times for additional instructions on the law of entrapment: "The whole thing is intent on the part of the defendant. \* \* \* Now that is all there is to this case. \* \* \*"

10. In charging the Jury so that failure to agree would seem to be a reflection upon the intelligence and integrity of some of them.

11. In effect gagging defense counsel and attempting to shut off proper objection to argument.

**REASONS RELIED ON FOR THE ALLOWANCE  
OF THE WRIT.**

Petitioner prays this Honorable Court for writ of certiorari directed to the Fifth Circuit Court of Appeals of the United States, and submits that this is a proper case for the granting of said writ for the following reasons, among others:

Because the United States Circuit Court of Appeals, Fifth Circuit, in affirming the judgment and order of the District Court:

(a) Has decided important questions of law in a way in conflict with applicable decisions of this Supreme Court.

(b) Has decided important questions of law in ways which conflict with applicable local decisions.

(c) Has decided important questions of general law and its decision is in conflict with the great weight of authority, and with the decisions of the other Circuit Courts of Appeal and of this Supreme Court.

(d) Has so far departed from the accepted and usual course of judicial procedure and has so far sanctioned such a departure by a lower court as to call for an exercise of the power of supervision by the United States Supreme Court.

(e) Has rendered null and void the safeguards of the Sixth Amendment to the Constitution of the United States, which provides that

"In all criminal prosecutions, the accused shall enjoy the right \* \* \* to be confronted with witnesses against him, \* \* \* and to have the assistance of counsel for his defense."

In view of the foregoing reasons and the supporting brief hereafter attached, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP DONALD DEHOFF,

*Attorney for Petitioner.*

## ARGUMENT IN SUPPORT OF PETITION.

### 1.

#### On Motion to Quash.

On the First Appeal from conviction, the Circuit Court of Appeals for the Fifth Circuit ruled that the lower court did not err in denying petitioner's motion to quash (*Weathers v. U. S.*, 117 F. 2d 585); however, in order to protect defendant's rights, counsel for the petitioner again renewed his motion to quash which raised the same grounds (R. 24-25). These grounds were set forth in full in the Transcript of the First Appeal Circuit Case No. 9541, pages 8-12).

It is our contention as the Court will see from a perusal of the indictment letter which the petitioner wrote that there is no positive assertion that the petitioner would give information how, where or by whom an abortion might be produced. A positive assertion is necessary to sustain an indictment and this was held necessary in the case of *Bours v. U. S.*, (C. C. A. 7) 229 Fed. 960.

### 2.

#### On Res Judicata As to Matters Raised by Original Second Count of Indictment.

On the first trial, when the court, after hearing all the evidence presented by the government, granted the defendant's Motion for directed verdict as to the second count and the Jury's verdict thereafter of not guilty was brought in, this judgment ascertained that the facts which were the basis for that second count did not exist. This was ascertained once and for all that as between the United States and the petitioner the same facts could not be again litigated or tried by them. *Coffey v. U. S.*, 116 U. S. 436, 6 S. Ct. 436, 29 L. Ed. 684; *U. S. v. Moser*,

266 U. S. 236, 45 S. Ct. 66, 69 L. Ed. 262; *In re Food Conservation Act*, 254 Fed. 893; *U. S. v. Carlisi*, 32 Fed. Supp. 479.

## 3.

**On Matters Pertaining to Hearsay, Violation of State Law and Entrapment.**

When the Court allowed the prosecution's witness, Post Office Inspector Jones, to testify that he had received complaints that the petitioner was committing abortions, the Court permitted inadmissible and fatally prejudicial testimony to be admitted into evidence. This statement was bald hearsay, or hearsay of hearsay. *Mattson v. U. S.*, (C. C. A. 8) 7 F. 2d 427; *Bolt v. U. S.*, (C. C. A. D. C.) 2 F. 2d 922; *Yep v. U. S.*, (C. C. A. 10) 83 F. 2d 41; *Gambino v. U. S.*, (C. C. A. 3) 108 F. 2d 140; *Biandi v. U. S.*, (C. C. A. 6) 259 Fed. 93.

The fact that the hearsay statement is under oath is not sufficient to remove the objection for there continues to be a deprivation of the defendant's Constitutional right to confront his accusers and subject them to cross-examination. *Gambino v. U. S.*, (C. C. A. 3) 108 F. 2d 140.

Assuming that the Court was not in error in allowing this hearsay testimony, the bare complaint is so indefinite that it gave the defendant no chance or opportunity to refute it and specified no persons who made any of the complaints to which Post Office Inspector testified. It specified no time when, place where, or circumstances surrounding, any such complaint and it was not competent evidence of the charge contained in the indictment. The court, we contend, was in error in not allowing the Petitioner to inquire into these above facts. The Post Office Inspector stated that after receiving these complaints he thereupon proceeded to send the decoy letters. The essence of the justification in decoy is that the decoying officer must have personal knowledge or perception of commission by the accused of similar of-

fenses to that which he is seeking to decoy. *U. S. v. Schultz*, 3 Fed. Supp. 273; *U. S. v. Tom Yu*, 1 Fed. Supp. 357. A necessary prerequisite for sending decoy letters is that the Petitioner had been previously engaged in the described conduct or conduct of same kind so as to justify entrapment letters. *U. S. v. Becker*, (C. C. A. 2) 62 F. 2d 1007; *U. S. v. Adams*, 59 Fed. 674; *Hunter v. U. S.*, (C. C. A. 5) 62 F. 2d 217. *Sorrells v. U. S.*, 287 U. S. 434, 53 S. Ct. 210, 77 L. Ed. 413.

Denied the right to inquire into the nature of the Government's information the petitioner was in effect denied the right to show that he was, in fact, entrapped. The right to inquire into the basis for entrapment is set forth in *Sorrells v. U. S.*, 287 U. S. 434, 53 S. Ct. 210, 77 L. Ed. 413.

## 4.

#### **On Additional Hearsay and Violation of State Law.**

The court, in an attempt to prove the Government's charge for illegally using the mails, permitted the District Attorney to question a witness as to an alleged conversation with the petitioner in which he is reported to have stated that he got Fifty dollars for every abortion. The inescapable conclusion is that it was an attempt to prejudice the petitioner in the eyes of the Jury; it attempted to prove commission, not of a Federal offense but of a State offense. Sending through the mails of the illegal matter was utterly ignored and the trial resulted in the conviction of the accused, not for an offense condemned by Federal statute but offense covered by state statute contrary to the settled rule. *Krause v. U. S.*, (C. C. A. 4) 29 F. 2d 248.

The petitioner stated that he did get Fifty dollars from every patient, but this amount covered the cost of child delivery, room and board (R. 182).

Testimony of a witness as to statement by defendant having no connection with the offense charged was in-



competent and its admission prejudicial error, especially where the defendant was a witness and his testimony conflicted with that of another witness is settled. *Toothman v. U. S.*, (C. C. A. 4) 203 Fed. 218; *Safer v. U. S.*, (C. C. A. 8) 87 Fed. 329.

## 5.

### Conduct of Assistant District Attorney.

On direct examination, the petitioner herein answered that he had been previously convicted of a crime (R. 179). On cross-examination the lower court permitted the District Attorney to inquire into the number of times he had been convicted (R. 185-187). In the case of *Cross v. State*, 96 Fla. 768, 119 So. 380, the Florida Supreme Court said:

"This court has held in numerous cases that, where an accused while on trial voluntarily offers himself as a witness on his own behalf, he thereby voluntarily subjects himself to any legitimate cross examination, whether such cross examination tends to incriminate him or not, and the state has the right on cross examination to interrogate him as to whether he has been previously convicted of a criminal offense. \* \* \* Of course, there are limits beyond which this character of cross examination cannot be pursued. For instance, where the accused admits the fact of a former conviction, this character of cross examination cannot be further pressed upon the accused merely for the purpose of showing that the accused, having been convicted of other crimes of like character, would be likely to commit the crime with which he is charged."

The court permitted examination by the government as to whether the petitioner had been disbarred from practice of medicine and further questioned the petitioner as to whether his ex-wife was his commonlaw wife (R. 188-191). The sole purpose of this line of cross examination was an attack on petitioner's character or reputation, to more readily induce belief that the petitioner



was guilty of the charge for which he was being tried, *Messer et al. v. State*, 120 Fla. 95, 162 So. 146.

"The character of a person accused of crime is not a fact in issue, and the state cannot, for the purpose of inducing belief in his guilt, introduce evidence tending to show his bad character or reputation, unless the accused, conceiving that his case will be strengthened by proof of good character opens the door to proof by the prosecution that his character in fact is bad. This salutary rule is not permitted to be violated by the state, even when the defendant offers himself as a witness. \* \* \* And this is true, although a defendant offering himself as a witness is subject to impeachment just like any other witness so far as his status and character as a witness, not as a defendant on trial, is concerned."

*Jordan v. State*, 107 Fla. 333, 144 So. 669.

It was well known or should have been known to the prosecuting attorney that the petitioner's right to reinstatement of his license to practice medicine had been upheld by the Supreme Court of Florida, in *State ex rel. Weathers v. Davis*, 196 So. 487, 143 Fla. 250, decided May 28, 1940.

In the case of *Butler v. State*, 94 Fla. 163, 113 So. 699, the Court said:

"Want of chastity on the part of a witness cannot be inquired into in any case for the sole purpose of affecting his or her credibility as a witness."

During the course of the argument objections were made to numerous remarks by the government's attorney not based on evidence such as his use of the word "dope peddlers" (R. 201-202) and to his further characterization of defendant's place as a "dive" (R. 208-209). During the further course of the argument the prosecuting attorney went beyond the scope of any evidence introduced therein (R. 204-206, 211 and 213), and suggested that the Government had certain information or evidence

which it could have used in place of the decoy letters. These statements of counsel in argument were not inadvertent and were not made in the heat of argument with opposing counsel, but were deliberate. They were intended by counsel to influence the jury improperly and in all probability did so influence the Jury (R. 211). *Turner v. U. S.*, (C. C. A. 8) 35 F. 2d 25; *Latham v. U. S.*, (C. C. A. 5) 226 Fed. 420. The innuendoes and suggestions of general criminality were calculated to arouse a spirit of resentment and tended to incite the passions and influence the minds of the jurors against defendant and went far beyond reasonable bounds of argument. *Clinton v. State*, 53 Fla. 98, 43 So. 312.

It is necessary in order to obtain a clear picture of the course of conduct of the Assistant District Attorney to read the entire testimony, but we think that from a perusal of the few excerpts cited herein, this Honorable Court will immediately grasp the situation. We think that this case is analogous in every respect to the principle which was condemned in no uncertain terms by the Supreme Court of the United States in *Berger v. U. S.*, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314.

## 6.

**Conduct of the Court.**

After the Jury had retired for consideration of the evidence, it returned several times to ask the Court for further instructions. Without first advising counsel for both parties of his intention to do so, and according them a reasonable opportunity to request special charges the court at once proceeded to give the Jury its version of the law requested. This was error. *Deas v. State*, 119 Fla. 839, 161 So. 729.

The court, on one of these Jury returns for instruction, was informed by a juror that there was a wide difference of opinion among the members of the jury concerning

the use of the word "entrapment." After a few words of instruction along that line, the court then went on to charge the jury, in part:

"The main question in this case, gentlemen, is the question of intent. \* \* \* The whole thing is a question of intent on the part of the defendant. \* \* \* Now, that is all there is to this case" (R. 226-227).

We contend that this instruction on the part of the court tended in effect to influence the Jury's deliberation and that they were not left free to the extent that each juror should follow the dictates of his mind and conscience in arriving at his verdict after consideration of all the facts. He should reason with his fellow jurors but he should not be coerced. *Croft v. State*, 117 Fla. 832, 158 So. 454. This is evidently what happened, because the jurors, as will be noted from their repeated requests for information on entrapment, were then in effect deprived of their right to argue and base their verdict on whether or not there had been entrapment. The court in effect took this question, which was one of the defendant's defenses, entirely from consideration of the jurors and left before them merely the point of intent in sending the letter. It is the duty of the court to refrain from intimidation or coercion of the jury. *Bozett v. U. S.*, (C. C. A. 5) 48 F. 2d 482.

After the Jury had announced that they were hopelessly divided the Court then proceeded to give the jury an additional charge on the line of the "Allen Case" (R. 223). We contend, however, that this charge was erroneous because it in effect gave the jury to believe that the all-important thing was a final disposition of the case regardless of the rights of the parties.

"It so slightly treated the positive duty of each juror to form and to make his verdict express his own honest conviction, based on the evidence in the case, and so forcibly urged deference to the views of the majority and unanimity, that we are unable to

resist the conviction that it tended too strongly towards coercion of the minority of the jury to surrender their honest convictions in order to acquiesce in the convictions of the majority. \* \* \* Its tendency was to bring the minority to an agreement with the others even against the dictates of their own judgment."

*Stewart v. U. S.*, (C. C. A. 8) 300 Fed. 769.

See also *Peterson v. U. S.*, (C. C. A. 9) 213 Fed. 920.

In the said additional charge in the present case, the court stated:

"\* \* \* If, however, the large number of jurors are for a conviction, the dissenting jurors should consider whether his doubt is a reasonable one, when it made no impression upon the minds of so many other jurors, equally honest, equally intelligent with himself; if, on the other hand, the majority of the jury is for an acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of judgment which is not concurred in by the majority of their fellows. \* \* \*" (R. 223).

This particular portion of the charge constituted coercion outside the force of reason and advice as to the facts, and reflected upon the juror's intelligence and integrity. *Kesley v. U. S.*, (C. C. A. 5) 47 F. 2d 453.

During the prosecuting attorney's argument to the jury, defendant's counsel made an objection and the court said:

"Objection overruled. Go ahead Mr. Yerkes. Let's not have any more interruptions" (R. 206).

And a short time thereafter when another objection was made by the defense counsel, the court sent the jury out and stated that it appeared to him that petitioner's counsel were trying to heckle the District Attorney and he was going to stop it (R. 208); when counsel as a matter of fact were making objections in good faith based on their recollection of the testimony.

We contend that the court by its statements gagged and closed the mouths of defense counsel and attempted to shut off proper objections to argument. Petitioner contends that the aforesaid procedure denied him his constitutional rights as provided by Sixth Amendment to the Constitution of the United States, which reads:

"In all criminal prosecutions, the accused shall enjoy the right \* \* \* to have the assistance of counsel for his defense."

Petitioner also states that in addition to the foregoing, the case of *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, fully supports and brings this case within the jurisdictional provisions relied on, especially that part of the Honorable Justice Black's decision on Page 463, thereof, which reads:

"\* \* \* he requires the guiding hand of counsel at every step in the proceedings against him."

Being informed by the Court that he was going to stop all these objections, defense counsel did not offer any further objections because they felt that they might prejudice the rights of petitioner by some act on the part of the court directed against them. This Court may consider all assignments attacking the propriety of argument of prosecuting attorney thereafter made on the ground that specific objections would have been made but for the court's arbitrary action. *Henderson v. State*, 94 Fla. 318, 113 So. 689.

We have not attempted to set forth in full in this Brief all the misstatements made by the government attorney after the court in effect gagged the defense counsel. However, it can be seen from the excerpts above and from perusal of his argument that without any fear of being corrected, or objection being made to his statements the Assistant District Attorney threw caution to the winds and proceeded to villify and attack not only defendant's character, but also made statements not based on any

evidence received in the record and on the whole committed numerous prejudicial, reversible errors.

**Conclusion.**

It is therefore respectfully submitted that this Petition for a writ of certiorari should be granted.

PHILIP DONALD DEHOFF,  
Jacksonville, Florida,

*Attorney for Petitioner.*

March, 1942.